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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

COLGATE-PALMOLIVE COMPANY,
Petitioner,

v.

FRANCHISE TAX BOARD,
An Agency of the State of California,
Respondent.

On a Petition for a Writ of Certiorari to the Court of Appeal of the State of California In and For the Third Appellate District

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF TAX EXECUTIVES INSTITUTE, INC. AS AMICUS CURIAE ON PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF TAX EXECUTIVES INSTITUTE, INC. ON PETITION FOR A WRIT OF CERTIORARI

To the Honorable Chief Justice of the United States and the Associate Chief Justices of the Supreme Court of the United States:

Pursuant to Rule 37 of the Rules of this Court, Tax Executives Institute, Inc. respectfully moves this Court for leave to file the accompanying brief as *amicus curiae* in support of the Petition for a Writ of Certiorari.

Tax Executives Institute has requested the written consent of all parties to the filing of the accompanying brief. Petitioner Colgate-Palmolive Company has consented to the filing of the brief, but Respondent Franchise Tax Board has refused to consent.[1]

1. Tax Executives Institute, Inc. (hereinafter "TEI" or "the Institute") is a voluntary, non-profit association of corporate and other business executives, managers, and administrators who are responsible for the tax affairs of their employers. The Institute was organized in 1944 and currently has approximately 4,800 members who represent more than 2,400 of the leading corporations in the United States and Canada, nearly all of which are engaged in interstate or foreign commerce. The Institute is dedicated to promoting the uniform and equitable enforcement of the tax laws throughout the Nation, to reducing the costs and burdens of administration and compliance to the benefit of both the government and taxpayers, and to vindicating the Commerce Clause and other constitutional rights of all business taxpayers.

2. The members of the Institute represent a cross-section of the business community in North America, including foreign-based corporate groups and U.S.-based groups engaged in foreign commerce, and have a significant interest in the effect of worldwide combined reporting on multinational corporations.

3. The issue presented in this case is the constitutionality of the worldwide combined reporting method of taxation as mandatorily applied to a U.S.-based multinational group of corporations. This case is closely related to *Barclays Bank PLC v. Franchise Tax Board*, 61 U.S.L.W. 3621 (U.S. Feb. 22, 1993) (No. 92-1384), which concerns the application of California's system of taxation to a foreign-based multinational corporation. Both cases raise fundamental questions concerning the application of the Commerce Clause of the Constitution to multijurisdictional businesses.

a. TEI is concerned that a taxpayer-favorable decision in the *Barclays* case, coupled with the Court's not granting a writ in this case, may create disparities between the treatment of U.S.- and foreign-based multinational corporations. Specifically, many of the companies represented by the Institute's membership will be directly affected by the discriminatory taxing scheme that may result if the Court finds worldwide combined reporting to contravene the Commerce Clause as applied to foreign-based taxpayers but is silent on the propriety of the method's application to U.S.-based taxpayers. *See Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 203 (1983) (Powell, J., with Burger, C.J., and O'Connor, J., dissenting) (invalidating worldwide combined reporting as applied only to foreign-based groups would be "unacceptable" because "[i]t would leave California free to discriminate against a Delaware corporation in favor of an overseas corporation").

b. Moreover, if the Court declines to hear *Barclays* or sustains the constitutional vitality of worldwide combined reporting as it applies to foreign-based companies, the Institute's members whose companies operate in California may find themselves the innocent victims of retaliation by foreign taxing jurisdictions. For example, the United Kingdom has announced that it will take direct retaliatory measures against U.S.-based multinational groups if the problem of worldwide combined reporting as applied to foreign-based groups is not resolved by the end of the year. *See Unitary Taxes: Subsidiaries of U.S. Firms Warned by U.K. of Possible Unitary Tax Retaliation*, BNA Daily Tax Rep., No. 122, June 28, 1993, at G-5 (British government has sent letters to 4,000 U.K. subsidiaries of U.S. firms with operations in California,

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[1] The consent of the Petitioner has been filed with the Clerk of the Court.

warning the companies that they could be affected by any U.K. retaliatory action). Such a result threatens to vitiate the core value of free trade that emanates from the Commerce Clause. *See Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue & Finance,* 112 S. Ct. 2365, 2370 (1992) (the Foreign Commerce Clause protects foreign and domestic firms alike because a State's interference with "foreign commerce may create problems, such as the potential for international retaliation, that concern the Nation as a whole").

c. In other words, the Commerce Clause rights of U.S.-based companies are inextricably entwined with the resolution of the *Barclays* case, and hence that case is entwined with the instant one. If the Court declines to hear *Barclays* (or upholds worldwide combined reporting), U.S. companies will face reprisals from foreign governments. On the other hand, if the Court grants review in *Barclays* and vindicates the Commerce Clause rights of foreign-based companies without addressing the application of worldwide combined reporting to U.S.-based groups in the instant case, those U.S. companies may well confront a discriminatory taxing scheme. Neither result would be consonant with the Commerce Clause or with the Court's duty "to make the delicate adjustment between the national interest in free and open trade and the legitimate interest of the individual States in exercising their taxing powers." *Boston Stock Exch. v. State Tax Comm'n,* 429 U.S. 318, 329 (1977).

4. Because TEI members and the companies by whom they are employed will be materially affected by any decision affecting the Commerce Clause rights of multijurisdictional businesses, the Institute has a special interest in the outcome of this case.

WHEREFORE, it is respectfully requested that Tax Executives Institute's motion for leave to file the accompanying brief *amicus curiae* in support of granting the Petition for a Writ of Certiorari in this case be granted.

Respectfully submitted,

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July 19, 1993

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BRIEF OF TAX EXECUTIVES INSTITUTE, INC. AS AMICUS CURIAE ON PETITION FOR A WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

Pursuant to Rule 37 of the Rules of this Court, Tax Executives Institute, Inc. respectfully submits this brief as *amicus curiae* in support of granting the petition for a writ of certiorari. Tax Executives Institute (hereinafter "TEI" or "the Institute") is a voluntary, non-profit association of corporate and other business executives, managers, and administrators who are responsible for the tax affairs of their employers. The Institute was organized in 1944 and currently has approximately 4,800 members

who represent more than 2,400 of the leading corporations in the United States and Canada.

TEI is dedicated to promoting the uniform and equitable enforcement of the tax laws throughout the Nation, to reducing the costs and burdens of administration and compliance to the benefit of both the government and taxpayers, and to vindicating the Commerce Clause and other constitutional rights of all business taxpayers. The members of the Institute represent a cross-section of the business community in North America. The overwhelming majority of the companies represented by our membership are engaged in interstate commerce and a substantial number of them have significant sales or operations overseas. In addition, the Institute's membership includes individuals who are employed by the U.S. affiliates of foreign-based multinational groups. Consequently, the Institute and its members have a direct and substantial interest in the effect of the worldwide combined reporting method of taxation on multijurisdictional corporations.

The issue presented in this case is the constitutionality of the worldwide combined reporting method of taxation as mandatorily applied to a U.S.-based multinational group of corporations. This case is closely related to *Barclays Bank PLC v. Franchise Tax Board*, 61 U.S.L.W. 3621 (U.S. Feb. 22, 1993) (No. 92-1384), which is also before the Court and which concerns the application of California's system of taxation to a foreign-based multinational corporation. Both cases raise fundamental questions concerning the application of the Commerce Clause of the Constitution to multijurisdictional businesses. TEI is concerned that a taxpayer-favorable decision in *Barclays*, coupled with the Court's *not* granting a writ in this case, may create disparities between the treatment of U.S.- and foreign-based multinational corporations. On the other hand, if the Court declines to strike down worldwide combined reporting as it applies to foreign-based companies, the Institute's members whose companies operate in

California may find themselves the innocent victims of retaliation by foreign taxing jurisdictions.

Because TEI members and the companies by whom they are employed will be materially affected by the Court's decision, the Institute has a special interest in the outcome of this case.

SUMMARY OF ARGUMENT

The issue presented in this case is the constitutionality of the worldwide combined reporting method of taxation as mandatorily applied to a U.S.-based multinational group of corporations. This case is closely related to *Barclays Bank PLC v. Franchise Tax Board*, 61 U.S.L.W. 3621 (U.S. Feb. 22, 1993) (No. 92-1384), which concerns the application of California's system of taxation to a foreign-based multinational corporation. Both cases raise fundamental questions concerning the application of the Commerce Clause of the Constitution to multijurisdictional businesses.

The Court has already recognized the potential significance of the *Barclays* case by inviting the Solicitor General to submit a brief *amicus curiae* expressing the views of the United States. Because the constitutional issue involved in *Barclays* is also present in the instant case (albeit in a different factual setting), *amicus* TEI urges the Court to link the two cases. Hence, if a writ of certiorari is granted in *Barclays*, a writ should also be issued in the instant case. If this case is not heard, U.S.-based taxpayers may be faced with continued uncertainty at best and a discriminatory taxing scheme at worst.

This Court has unequivocally recognized that "the constitutional prohibition against state taxation of foreign commerce is broader than the protection afforded to interstate commerce." *Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue & Finance*, 112 S. Ct. 2365, 2370 (1992). The broader protection—which extends to U.S.-based companies engaged in foreign commerce—owes itself to

the realization that a State's interference with foreign commerce may create problems, including international retaliation. *Id.* Additionally, the Commerce Clause proscribes the granting of a preference to one form of commerce over another. *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 329 (1977). Thus, discrimination between foreign-based and U.S.-based multinational groups—each engaged in foreign commerce—is wholly inconsistent with the Commerce Clause's free trade purposes.

A writ of certiorari should also issue in the instant case because the potential for retaliation that concerned the Court in *Kraft* is manifest here. The United Kingdom has already enacted legislation to deny refunds on dividends paid by U.K. subsidiaries to certain U.S. multinational corporations. The tax authorities in that country recently announced that direct retaliatory measures will be taken against U.S. multinational groups if the problem of worldwide combined reporting as applied to foreign-based groups is not resolved by the end of 1993. The German government (among others) is considering similar retaliatory action. Such retaliation threatens to vitiate the core value of free trade that emanates from the Commerce Clause and that protects foreign-based and U.S.-based groups alike.

ARGUMENT

I.

This Court now has before it separate petitions for writs of certiorari in two cases involving the constitutional validity of California's system of taxing multijurisdictional businesses that are engaged in foreign commerce. The State of California uses what is known as the worldwide combined reporting method of taxation, under which all the worldwide affiliates of a multinational group of corporations that are engaged in a unitary business are treated as a single enterprise; the unitary group's worldwide income is apportioned between California and the rest of the world based on a three-factor formula of property, payroll, and sales.[1] *Barclays Bank PLC v. Franchise Tax Board*, 61 U.S.L.W. 3621 (U.S. Feb. 22, 1993) (No. 92-1384), involves the application of the worldwide combined reporting method to a group of foreign and domestic corporations with a foreign parent (a foreign-based multinational group). The instant case, in contrast, involves the mandatory application of worldwide combined reporting to a U.S.-based multinational group—*i.e.*, one whose parent is a domestic corporation.

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[1] Worldwide combined reporting is substantially different from the arm's-length, or "separate accounting," method that the United States has adopted not only for purposes of the Internal Revenue Code, but also in its income tax treaties with foreign countries. *See* I.R.C. § 482; U.S. Department of the Treasury, *Model Income Tax Treaty of June 16, 1981*, arts. 7(2), 9(2), *reprinted in* 1 Tax Treaties (CCH) ¶ 211 (1993). Under this method—which has gained international acceptance—the members of a multijurisdictional group are viewed as separate from one another, and the income of any particular member of a group is determined on the basis of the internal accounting records of that member; group members are required to report intercompany transactions on an arm's-length basis—that is to say, as if they were dealing with unrelated entities. *See* Organization for Economic Co-operation and Development, *Model Convention for the Avoidance of Double Taxation with Respect to Taxes on Income and Capital*, arts. 7(2), 9(2) (1992), *reprinted in* 1 Tax Treaties (CCH) ¶ 201 (1993).

The companies represented by *amicus* TEI have no uniform position concerning the propriety or impropriety of the worldwide combined reporting method of taxation. Some companies benefit from the unitary method in terms of their tax liability, whereas others would clearly pay higher taxes if the mandatory use of the method were sustained. No one benefits, however, from the uncertainty that has prevailed in this area since at least 1983—when the Court decided *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983)—and that will continue to obtain in the absence of the Court's resolution of the issues raised by *Barclays* and the instant case. Consequently, the Court should act to discharge its duty "to make the delicate adjustment between the national interest in free and open trade and the legitimate interest of the individual States in exercising their taxing powers." *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 329 (1977).

II.

The Court has already recognized the potential significance of the *Barclays* case by inviting the Solicitor General to submit a brief *amicus curiae* expressing the views of the United States. 61 U.S.L.W. 3771 (U.S. May 17, 1993) (No. 92-1384). Because the constitutional issue involved in *Barclays*—whether worldwide combined reporting violates the Commerce Clause of the Constitution—is also present in the instant case (albeit in a different factual setting), *amicus* TEI urges the Court to link the two cases. Hence, if a writ of certiorari is granted in *Barclays*, a writ should also be issued in the instant case. Such an action will help ensure that the constitutional issue will be resolved in a comprehensive, balanced, and consistent manner. If the instant case is not heard, U.S.-based taxpayers may be faced with continued uncertainty at best and a discriminatory taxing scheme at worst.

The similarities between *Barclays* and the instant case are easily stated. Both cases involve the propriety of

California's imposition of the worldwide combined reporting method of taxation. In upholding the California taxing scheme in each case, the California courts relied on the same dubious interpretation of this Court's 1986 decision in *Wardair Canada Inc. v. Florida Dep't of Revenue*, 477 U.S. 1 (1986).[2] Specifically, the courts below distended *Wardair* to transmute congressional silence (or inaction) about worldwide combined reporting into approval of that method of taxation. *Amicus* TEI submits that certiorari should be granted in both cases to prevent the evisceration—by acquiescence—of the Court's dormant Commerce Clause jurisprudence.

Perhaps even more important than the two cases' similarities, however, is their fundamental difference: *Barclays* involves a foreign-based corporate group, whereas the instant case involves a U.S.-based group. Thus, if review is granted in *Barclays* to vindicate the Commerce Clause rights of Barclays and other foreign-based multinational groups, the question presented by the instant case explicitly becomes whether "[t]he condemnation of the worldwide unitary method applies to all instrumentalities of foreign commerce, not just foreign based corporate groups." *Colgate-Palmolive Co. v. Franchise Tax Board*, No. 319715, *reprinted at* App. F, at 90a (Sup. Ct. for

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[2] In the instant case, the California Court of Appeal felt constrained to adopt the analysis of *Wardair* propounded by the California Supreme Court in *Barclays. Colgate-Palmolive Co. v. Franchise Tax Board*, 13 Cal. Rptr. 2d 761, 771 (Cal. App. 3 Dist. 1992), *reprinted at* Appendix B to Colgate-Palmolive's Petition for a Writ of Certiorari (App.), at 18a. *See Barclay's Bank Internat'l Ltd. v. Franchise Tax Board*, 2 Cal. 4th 708, 714 (1992) (*Wardair* "reflects a diminution in the reach of dormant foreign commerce clause analysis in favor of an expanded recognition that, under circumscribed conditions, governmental silence may constitute a ratification of state taxation of foreign commerce, rendering a dormant analysis inapposite"), *on remand*, 14 Cal. Rptr. 2d 537 (Cal. App. 3 Dist. 1992), *petition for cert. filed sub nom. Barclays Bank PLC v. Franchise Tax Board*, 61 U.S.L.W. 3621 (U.S. Feb. 22, 1993) (No. 92-1384).

the County of Sacramento, April 19, 1989). *Amicus* TEI submits that to pose the question is to answer it: U.S.-based groups are properly accorded no less protection by the Commerce Clause than foreign-based groups. Thus, the Court should grant review in order to confirm that the Constitution requires that the foreign commerce conducted by a U.S.-based multinational group be taxed in the same way as the foreign commerce conducted by a foreign-based multinational group.

III.

The Court has recognized that "the constitutional prohibition against state taxation of *foreign* commerce is broader than the protection afforded to interstate commerce." *Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue & Finance*, 112 S. Ct. 2365, 2370 (1992) (citing *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 445-46 (1979)) (emphasis added).[3] The broader protection —which extends not only to foreign taxpayers but to U.S.-based taxpayers engaged in foreign commerce—owes itself to the realization that a State's interference with "foreign commerce may create problems, such as the potential for international retaliation, that concern the Nation as a whole." *Id.* at 2370.

Additionally, the Court has unequivocally held that the Commerce Clause proscribes the granting of a preference to one form of commerce over another. *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 329 (1977). Thus, discrimination between foreign-based and U.S.-based multinational groups—each engaged in foreign

[3] Thus, a state tax cannot survive scrutiny under the Foreign Commerce Clause if the tax would "impair federal uniformity in an area where federal uniformity is essential," *Japan Line*, 441 U.S. at 448, or prevent "the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments.'" *Id.* at 451 (quoting *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976)).

commerce—is "wholly inconsistent with the free trade purpose of the Commerce Clause." *See id.* at 336; *Kraft*, 112 S. Ct. at 2370; *accord Container Corp. of America v. Franchise Tax Board, supra*, 463 U.S. at 203 (Powell, J., with Burger, C.J., and O'Connor, J., dissenting) (invalidating worldwide combined reporting as applied only to foreign-based groups would be "unacceptable" because "[i]t would leave California free to discriminate against a Delaware corporation in favor of an overseas corporation").

A writ of certiorari should issue in the instant case because the potential for retaliation that concerned the Court in *Kraft* is manifest here. In 1985, the United Kingdom enacted legislation that would effectively penalize U.S.-based corporate groups for the States' (and Federal Government's) inability to resolve the worldwide combined reporting issue in a satisfactory manner.[4] More recently, tax authorities in the United Kingdom have announced that the government will take direct retaliatory measures against U.S.-based multinational groups if the problem of worldwide combined reporting as applied to foreign-based groups is not resolved by the end of 1993. *See Unitary Taxes: Subsidiaries of U.S. Firms Warned by U.K. of Possible Unitary Tax Retaliation*, BNA Daily Tax Rep., No. 122, June 28, 1993, at G-5 (Inland Revenue issued a press release dated May 13, 1993, and has sent letters to 4,000 U.K. subsidiaries of U.S. firms with operations in California, warning the companies that they could be affected by any U.K. retaliatory action[5]).

[4] Sections 54(1) and (3) of, and schedule 13, paragraph 15 to, the Finance Act of 1985, *reenacted as* sections 812-815 of the U.K. Income and Corporation Taxes Act, 1988, would deny Advance Corporation Tax refunds on dividends paid by U.K. subsidiaries to certain U.S. multinational corporations (those having a qualifying presence in a unitary state such as California).

[5] The press release issued by Inland Revenue (the U.K. tax agency) quotes the Chancellor of the Exchequer, as follows:

Other countries, too, have abjured California's abandonment of "the hitherto prevailing principles for the taxation of international business enterprises" and threatened reprisals against U.S.-based groups. *See Unitary Taxes: Bundestag Calls on German Government to Consider Possible Retaliatory Action*, BNA Daily Tax Rep., No. 133, July 14, 1993, at G-1 (resolution of German Bundestag's Finance Committee calls on German government to consider retaliatory steps if a solution to California worldwide combined reporting controversy cannot be reached by the end of 1993; European Community Tax Commissioner Christiane Scrivener has warned that the European Community may also take retaliatory measures). Such retaliation threatens to vitiate the core value of free trade that emanates from the Commerce Clause and that protects foreign-based and U.S.-based groups alike.

IV.

The Commerce Clause rights of U.S.-based companies are inextricably entwined with the resolution of the *Barclays* case, and hence that case is entwined with the instant one. If the Court declines to hear *Barclays* (or upholds worldwide combined reporting), U.S. companies may face reprisals from foreign governments. In contrast, if the Court grants review in *Barclays* and vindicates the Commerce Clause rights of foreign-based companies without addressing the application of worldwide combined reporting to U.S.-based groups in the instant case, those U.S. companies may well confront a discriminatory taxing

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> [T]he [British] Government will have to take retaliatory measures in relation to United States based companies if there is not a satisfactory resolution of the problem of the internationally-opposed unitary tax on foreign-owned companies in California by the end of this year. Meanwhile, I have instructed the Inland Revenue to obtain information from California-based companies in the U.K. on the probable impact of such retaliatory measures.
>
> Press Release of Inland Revenue (May 13, 1993).

scheme. Neither result would be consonant with the policies underlying the Commerce Clause.

To avoid such a result, the Court should act to discharge its duty "to make the delicate adjustment between the national interest in free and open trade and the legitimate interest of the individual States in exercising their taxing powers." *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 329 (1977). Where the States have overstepped their bounds and impinged upon the rights of taxpayers—be they U.S.-based or foreign-based—it is incumbent upon the Court to intercede in order to restore the constitutional balance—and thereby to vivify the core values underlying the Commerce Clause.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari in this case.

Respectfully submitted,

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